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Nos. 95-779 and 95-259

In the Supreme Court of the United States

OCTOBER TERM, 1995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER

DARLENE WALTERS, PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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1. a. Respondents' principal argument (Resp. Br. 8, 9, 10-11) is that the Court should reject the EEOC's interpretation of the definition of "employer" in Title VII, 42 U.S.C. 2000e(b), because, in respondents' view, that interpretation renders meaningless the phrase "for each working day" which is contained

in the statutory definition.[1] That argument is incorrect. As we explain in our opening brief (EEOC Br. 22), the EEOC's interpretation gives meaning to that phrase: Because of the phrase, an employer is not covered by Title VII unless the employer has 15 or more employees on his payroll for *each working day* of 20 weeks in a year; it is not sufficient for the employer to have 15 different employees during the course of the entire week if he has fewer than 15 on his payroll for any day of the week.

Congress has, moreover, clearly demonstrated that it believes that the EEOC's interpretation gives meaning to the phrase. Congress included the same phrase in the definition of "employer" in the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.* The Senate Report accompanying that legislation stated that the definition of "employer" in the FMLA was intended to receive the same interpretation given by the EEOC to the "employer" definition in Title VII. The Report explained that "part-time employees and employees on leaves of absence would be counted as 'employed for each working day' so long as they are on the employer's payroll for each day of the workweek. On the other hand, an employee who begins employment, i.e., is added to the employer's payroll, after the beginning of a workweek, or who terminates employment prior to

[1] Section 2000e(b) provides, in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * *.

42 U.S.C. 2000e(b).

the end of the workweek, will not count as being employed on 'each working day' of such week." S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993).[2] See also *McLeod* v. *City of Newton*, Civ. A. No. CV-95-A-1573-S, 1996 WL 405738, at *3 (M.D. Ala. July 12, 1996) (adopting First Circuit's payroll interpretation in a Title VII case, specifically noting that "[t]he words 'for each working day' are not rendered superfluous" by the payroll interpretation).[3]

In fact, both the EEOC's and respondents' interpretations of Section 2000e(b) give meaning to the phrase "for each working day." Both require a determination of the number of employees that an employer "has" on each working day of a week. The difference is that the EEOC makes that determination by count-

[2] Respondents contend (Resp. Br. 32) that, contrary to Congress's expressed intent, the payroll method of counting employees that is applied by the EEOC is not required under the FMLA. Respondents point to the fact that, in the FMLA, Congress used the phrase "employs * * * for each working day" rather than "has * * * for each working day." Compare 29 U.S.C. 2611(4)(A) with 42 U.S.C. 2000e(b). Respondents assert that, in light of the use of the verb "employ," which includes "permit[ting] to work," see 29 U.S.C. 2611(3) (referencing 29 U.S.C. 203(g)), the FMLA should be interpreted as counting only employees who are physically present at the work site. Resp. Br. 32-33. Both Section 2000e(b) and the employer definition in the FMLA, however, focus on the maintenance of an employment relationship by requiring that an employer "have" or "employ" a certain number of employees for each working day of the week. The payroll method of counting employees properly addresses that requirement.

[3] Respondents' suggestion (Resp. Br. 17-18) that petitioners' interpretation expands federal subject matter jurisdiction is based on their erroneous premise that petitioners' interpretation construes the definition of "employer" in Title VII more broadly than the statutory text permits.

ing the employees on the employer's payroll for each working day in that week, whereas respondents would take attendance for each working day in the week and then add to that total the number of hourly paid employees on paid leave on each working day, as well as any salaried employees not yet counted (including those on any type of leave).[4]

b. Respondents also claim (Resp. Br. 8, 12-16, 39-40) that petitioners applied the payroll method differently in the courts below and failed to give effect to the phrase "for each working day." Respondents point out that the weekly payroll summaries included in the record (J.A. 28-79) indicate the number of employees on respondents' weekly payroll. For purposes of that count, some employees, whose first or last day at work was in the middle of a week, were included in the count for each day of the week. Under the EEOC's payroll method, if any of those employees was added to or removed from the payroll in midweek, the employee should have been counted toward the daily employee count only on the days on which the employee was on the payroll. The summaries do not permit such a determination because they do not

[4] Respondents do not address the irrationalities inherent in their counting method—*e.g.*, that hourly paid employees are treated differently from salaried employees; that some part-time employees are counted each day because they work a minimum amount of time each day whereas some full-time employees are counted for a lesser number of days despite the fact that they work significantly more hours in fewer days; that hourly paid employees on their regular day off are not counted on that day regardless of the fact that their employment relationship precludes them from working for a competitor on that day or that they must be available as a replacement employee if necessary on their off days.

indicate when an employee was added to or removed from respondents' payroll.[5]

The summaries in the record in this case are complete for purposes of applying the counting method that the parties were bound to apply below under existing Seventh Circuit precedent. The parties did not focus in the courts below on how to count employees who were added to or removed from respondents' payroll midweek. The EEOC's analysis of how to count employees focused on employees who were "maintained" on the employer's payroll for the given week and employees who were at work the day before their absence and expected to show up the following day, including two specific part-time employees who

[5] Although respondents refer to "midweek employment changes," Resp. Br. 14 n.7, it is not clear from the summaries that those changes involved payroll changes. For example, the summaries show that James Frawley, a full-time employee, worked four or five working days during each of the first eight weeks of the calendar year and received five days of vacation pay during the ninth week. J.A. 28-36. He is not listed at all in the tenth week. J.A. 37. Mr. Frawley reappears on the first day of the eleventh week and is listed as working five days that week, as well as the first two working days of the twelfth week. J.A. 38-39. He is not listed at all in the thirteenth week. J.A. 40. In the fourteenth week, he is listed as working only on Monday, and that is the final record for him. J.A. 41. It is unclear from these summaries whether Mr. Frawley was on unpaid leave, but still on the payroll, during any part of the time he was not listed as working or on paid leave. It also is unclear, for example, whether during the twelfth week he was taken off the payroll after the two days he worked, or whether he remained on the payroll until the end of the twelfth week and was removed from the payroll for the thirteenth week, or whether he remained on the payroll without working during the thirteenth week and was removed from the payroll after his final day of work in the fourteenth week.

were on respondents' payroll for the entire year. See EEOC's Memorandum in Opposition to Defendant's Motion to Dismiss 2, 4, 5, 10, 11, 13-14, 15; EEOC C.A. Br. 5, 6-7, 9, 10, 13, 17 n.16, 21; J.A. 23. This focus did not lend itself to consideration of circumstances where an employee is added to or removed from the payroll midweek.[6] The facts of this case, moreover, do not require resolution of that issue. Even if every week involving a midweek employment change were excluded, the total number of weeks during which respondents had 15 or more employees for each working day would still exceed 20 weeks, making respondents "employers" within the meaning of Section 2000e(b).

c. Respondents urge (Resp. Br. 11-12) the Court to adopt their interpretation of Section 2000e(b) because they believe that it is the counting method that an employer "would probably adopt" if asked how many employees he has for each working day in a given calendar week. Respondents do not explain why they believe this to be true. Nor do they provide a reason for believing that an employer would use a counting method different from the method the employer would use to respond to the question of how many employees he has on a given day. Respondents concede, however, that the latter question would prompt an employer to use the payroll method of counting (see Resp. Br. 11). As respondents state in their brief, that "count would include each hourly-paid employee, *whether he*

[6] When the issue of midweek changes in a payroll was mentioned on appeal, the EEOC discussed the FMLA approach and urged the same approach under Title VII, consistent with the EEOC's current interpretation. See EEOC C.A. Br. 17 & n.16.

worked that day or not, and if so, without regard to the number of hours worked. This counting method would necessarily exclude any individual who was not in an employment relationship with the employer on a given day. Thus, persons who had not yet begun, or who had already terminated their employment relationship with the employer, would not be counted. If the employer repeated this process for each working day of a given week, the resulting tall[ies] would include each hourly-paid employee with whom the employer had an employment relationship without regard to the number [of] days or hours that employee actually worked during the week." *Ibid.* (emphasis added).[7]

2. Respondents assert (Resp. Br. 8, 18-30) that the legislative history surrounding the relevant phrases in the definition of employer in Title VII is sparse, but reveals a congressional intent to "count hourly-paid workers only when they actually work." *Id.* at

[7] The one situation in which an employer might be prompted to use a different counting method is if he were simply asked whether he had 15 or more employees for a given week, without the qualifying phrase "for each working day" of the week. The employer would likely total the number of employees over the entire week without regard to which, or how many, employees worked on which days. For example, if an employer hired 25 inventory specialists on a one-time basis to conduct annual inventory and put them on the payroll for Monday and Tuesday, and the payroll returned to the employer's 10 regular employees on Wednesday, Thursday and Friday, the employer would respond that he had 15 or more employees that week. If, however, he were asked whether he had 15 or more employees for each working day of that week, his answer would be negative.

19.[8] The only statement they cite to support that assertion is a statement by Senator Humphrey that, once employers have more than 25 employees, "they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services." *Id.* at 26 (quoting 110 Cong. Rec. 13,088 (1964)). From this, respondents infer that Congress intended that only employees at work on a particular day should be counted because only those employees generate "income or output or * * * goods" on that day. *Ibid.* That interpretation is inconsistent with the court of appeals' ruling and respondents' own interpretation, both of which count salaried employees on all days regardless of their work schedules and count hourly paid employees on days that they are on paid leave. In both circumstances, those employees are counted on days that they do not generate any income, output, or goods. Moreover, respondents omit the second part of Senator Humphrey's statement, cited in our opening brief (EEOC Br. 31 n.22), explaining that employers with more than 25 employees "also lose most of whatever intimate, personal character they might have had." 110 Cong. Rec. 13,088 (1964). To the extent the size of an employer is based on the

[8] Elsewhere, respondents claim (Resp. Br. 19-24), somewhat inconsistently, that, because Congress did not draft any committee reports, the legislative history of Title VII is of lesser authority and does not reflect the understanding of Congress. As we explain in our opening brief, this legislation was enacted under unique circumstances, attracted an exceptionally high level of attention, and engendered lengthy debate over its coverage provisions. See EEOC Br. 23-32, 25 & n.18. In such circumstances, statements during the floor debate, especially statements by the authors of the relevant provision, are as authoritative as a committee report.

fact that an employer with fewer employees has a more intimate, personal character, the relevant employees to be counted are those with whom the employer maintains an employment relationship, not those that report to work on a particular day.

Respondents expend (Resp. Br. 23-30) a significant amount of effort attempting to diminish the significance of Senator Dirksen's statement that his amendment of the definition of "employer," to apply where there are 25 or more employees "for each working day in each of twenty or more calendar weeks," was based on the federal unemployment compensation act. Respondents' assertions do not change the fact that, in 1964, at the time of enactment of Section 2000e(b), the settled administrative interpretation of the unemployment compensation act's "employer" coverage provision was set forth in Revenue Ruling 55-19, 1955-1 C.B. 496, *reprinted at* J.A. 80-85. That ruling interpreted an "employer" coverage provision to count, among the requisite individuals employed "on each of some 20 days during the taxable year," all "regular employees" who maintained an employment relationship with the employer, even on days when those employees are "absen[t] from duty" and "perform[] no physical service for the employer." J.A. 81. This interpretation was based on the conclusion that "the employer-employee relationship which exists between the parties does not terminate by reason of their absence from duty for 1 or 2 days during the week. If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week." *Ibid.* Respondents point to nothing in the unemployment compensation act referred to by Senator Dirksen, one of the authors of the statutory language

at issue here, to support the contrary interpretation they urge.

3. Respondents argue (Resp. Br. 33-40) that the Court owes no deference to the EEOC's interpretation of Section 2000e(b) because that provision defines the jurisdiction of the EEOC, and the EEOC cannot interpret its own jurisdiction. Agencies, however, necessarily must address questions concerning the scope of their jurisdiction under the statutes they administer. And this Court has repeatedly held that deference to agency interpretation is appropriate in that context, as exemplified by a line of cases deferring to the National Labor Relations Board's interpretation of the statutory definition of "employee" covered by the National Labor Relations Act. See *Holly Farms Corp.* v. *NLRB*, 116 S. Ct. 1396, 1400-1402 (1996); *NLRB* v. *Town & Country Elec., Inc.*, 116 S. Ct. 450, 453-454 (1995); *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944). See also, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-135 (1985) (deferring to Corps of Engineers' interpretation of "waters of the United States" within the Corps' jurisdiction under the Clean Water Act as extending to certain wetlands).

In any event, as explained above and in our opening brief, the EEOC correctly interprets the statutory language in light of the statutory text and Title VII's overall structure, purpose, and history. The Court should adopt that interpretation based on the same factors and need not address any questions of deference. To the extent the Court finds Section 2000e(b) to be ambiguous, however, the EEOC's reasonable interpretation of that provision is entitled to deference.

Respondents also contend (Resp. Br. 35-36) that the EEOC's interpretation of Section 2000e(b) is not entitled to deference because the EEOC does not have authority "to promulgate rules or regulations." Respondents ignore the fact that the EEOC has explicit statutory authority to issue substantive regulations under the Age Discrimination in Employment Act of 1967 (ADEA), see 29 U.S.C. 628, and that the EEOC interprets the "employer" definition of the ADEA, 29 U.S.C. 630(b), which is identical in relevant respects to the "employer" definition in Title VII, in the same manner as it interprets Title VII's definition of "employer." See EEOC Br. 35 & n.24. That interpretation "is based on a permissible construction" of the identical statutory language and reflects "a reasonable policy choice for the agency to make," and thus warrants judicial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984).

Respondents err in stating that the EEOC's interpretation has not been consistent.[9] They compare the

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[9] Respondents also err in stating (Resp. Br. 37 n.23) that the EEOC did not cite the General Counsel opinions in the courts below. In contending in the court of appeals that the EEOC has formally and consistently interpreted the employer definitions in Title VII and the ADEA according to the payroll method, the EEOC cited not only its 1990 policy guidance, but also authority that had relied on two of the General Counsel opinions. See EEOC C.A. Reply Br. 17 n.12 (citing EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311 (Apr. 20, 1990)); *Pascutoi* v. *Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1326 (D. Minn. 1975) (citing 1966 opinions of EEOC General Counsel stating "that the crucial test is how many employees are on the payroll during the

EEOC's 1990 policy guidance with a provision in an earlier investigator's manual regarding what type of information EEOC investigators should collect to determine whether an employer employed the requisite number of employees. That investigators' manual passage used the term "employ," and included an illustration discussing what employees "worked" each working day and how to count them. Respondents claim that the passage reflected an interpretation different from the payroll approach. The investigators' manual is not a good source for the EEOC's interpretation in this instance, however, because the manual applied to investigators in all jurisdictions in the country, including the jurisdictions in which there already was binding authority applying the daily attendance method. More significantly, the passage simply was not focused on the question whether presence on a payroll for a particular working day warranted being counted for that day, nor was it focused on the question of how to count an employee who is added to or removed from a payroll midweek. There is no suggestion that it was intended as an announcement of a departure from the EEOC's interpretation, which dated back to 1966, that "[t]he term 'employees for each working day' * * * refers to persons on the payroll and regularly employed, not to the number of persons at work on any given day." EEOC, *First Annual Digest of Legal Interpretations of Title VII of the Civil Rights Act of 1964* (1966), citing a May 11, 1966, General Counsel opinion. In any event, even if the EEOC's interpretation of the definition of "employer" for purposes of Title VII and

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crucial 20-week periods and not how many are at work on a given day").

the ADEA had changed over time, that would not mean that judicial deference was not due the EEOC's present interpretation. See *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996) ("mere fact that an agency interpretation contradicts a prior agency position is not fatal").

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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SEPTEMBER 1996